

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT  
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE  
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

AUG 22 2008

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2008-0047-PR
	)	DEPARTMENT B
v.	)	
	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
DARRYL EUGENE KILGORE,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

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PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-52013

Honorable Clark W. Munger, Judge

REVIEW GRANTED; RELIEF DENIED

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Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Darryl E. Kilgore

Buckeye  
In Propria Persona

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E S P I N O S A, Judge.

¶1 Following a jury trial, petitioner Darryl Kilgore was convicted of aggravated assault with a deadly weapon or dangerous instrument and fraudulent scheme or artifice. The trial court sentenced him to consecutive, seven-year terms of imprisonment. We have previously affirmed Kilgore's convictions and sentences on appeal and denied relief on his petition for review of the trial court's denial of his first petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. *State v. Kilgore*, No. 2 CA-CR 97-0518 (memorandum decision filed Mar. 30, 1999); *State v. Kilgore*, No. 2 CA-CR 2002-0254-PR (memorandum decision filed May 29, 2003). This petition for review followed the trial court's dismissal of Kilgore's second petition for post-conviction relief. We will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶2 Kilgore argues he is entitled to relief based on newly discovered evidence pursuant to Rule 32.1(e). He contends that a letter dated March 19, 1996, written to the prosecutor by codefendant Andrea Munson's attorney constitutes newly discovered, exculpatory evidence. Kilgore suggests the letter, which apparently was part of the record in Munson's case, proves he did not commit aggravated assault or intend to engage in any illegal conduct with Munson. He contends the following language in the letter would have proved his innocence: "It is my understanding (and I could be wrong) that there was no collusion or conspiracy between [Munson] and [Kilgore] to engage in illegal behavior.

Furthermore, based on my conversation with [Munson], no assault with a car door occurred.”

¶3 In its ruling dismissing the Rule 32 petition, the trial court found Kilgore’s claims precluded under Rule 32.2(a) and rejected his argument that his claims were exempt from preclusion under Rule 32.2(b). In rejecting Kilgore’s newly discovered evidence claim, the court explained that “a copy of the letter was filed with the court on March 20, 1996, almost five months prior to trial,” a finding Kilgore does not directly dispute. Instead, Kilgore states on review that he “cannot and will not say if his trial attorney ever was afforded a copy of this letter or any pre-trial confession by Ms. Munson.” But even assuming Kilgore’s attorney was not provided a copy of the letter before trial, he could have discovered it with due diligence, as Rule 32.1(e)(2) requires. *See State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000) (requirement of newly discovered evidence is that defendant have exercised due diligence in discovering the evidence); *see also State v. Andersen*, 177 Ariz. 381, 387, 868 P.2d 964, 970 (App. 1993) (all elements must be satisfied to establish claim of newly discovered evidence). Moreover, the trial court found it “unlikely that the letter, had it been introduced as evidence, would have changed the verdict” and also noted that the evidence was cumulative to arguments Kilgore had presented at trial, thereby supporting its ruling that the letter did not constitute newly discovered evidence. *See Ariz. R. Crim. P. 32.1(e)(3)*.

¶4 Although Kilgore also argues he is entitled to relief on a claim of actual innocence pursuant to Rule 32.1(h) (“no reasonable fact-finder would have found [him] guilty of the underlying offense beyond a reasonable doubt”), he does not explain the basis for that argument, other than apparently suggesting that the “newly discovered evidence” would have proved his innocence. Having failed to set forth in his petition for review “[t]he reasons why the petition should be granted” on this ground, *see* Rule 32.9(c)(1)(iv), Kilgore failed to present a colorable, nonprecluded claim of actual innocence. The trial court properly rejected Kilgore’s claim of newly discovered evidence and thus did not abuse its discretion by dismissing the petition for post-conviction relief. Although we grant the petition for review, we deny relief.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge